International Islamic University Malaysia v Elemen Garisan Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WRIT SUMMONS NO 22NCC-1778[96]12 OF 2012
AZIZAH NAWAWI JC
12 FEBRUARY 2014

Contract — Tenancy agreement — Terms — Payment of security deposit — Non-renewal of tenancy after expiry — Premises surrendered — Whether security deposit should be returned — Whether joint audit pre-condition for refund of security deposit — Whether security deposit must be refunded without joint audit — Whether principal tenant had legal right to retain security deposit after expiry of tenancy agreement — Whether claim premature

The defendant, as a principal tenant, had rented premises ('the demised premises') from respective owners and had entered into a tenancy agreement with the plaintiff, the sub-tenant to house the latter's students for a period of five years. Pursuant to cl 4.1 of the tenancy agreement, the plaintiff had disbursed RM879,960 to the defendant as payment of security deposit. The tenancy agreement included provision of beds, mattresses, cupboards, chairs and tables ('the furniture') for 3,000 students. The plaintiff then gave notice under cl 12 of the tenancy agreement notifying that it would not renew the tenancy after its expiry on 31 May 2012 and the demised premises were then surrendered to the defendant on the said date. The parties subsequently had a meeting to resolve outstanding issues arising from the tenancy agreement and further agreement was made. The plaintiff paid the defendant RM2,988,988 in respect of the 'making good' of the demised premises under cl 6.15.2. The outstanding issue remained with regards to the security deposit in the sum of RM879,960 which was to be returned to the plaintiff. Despite letters from the plaintiff for the refund of the security deposits, the defendant failed to return the same. Hence, the plaintiff initiated the present suit to recover the security deposit. The issues that arose for determination were whether the joint audit was a pre-condition for the refund of the security deposit under the tenancy agreement; whether the security deposit of RM879,960 must be refunded to the plaintiff without the joint audit; whether the defendant had a legal right to retain the security deposit after the expiry of the tenancy agreement; and whether the plaintiff's claim was premature.

Held, dismissing the claim with costs of RM20,000:

(1) There was nothing in the tenancy agreement which provided the mechanics or procedures for the return of the security deposit. The

parties then had a meeting. The purpose of the meeting was to settle two issues, namely the 'make good' of any damages to the demised premises and the refund of the security deposit. The parties had agreed to conduct a joint audit to ascertain the necessary deduction before the refund of the security deposit could be made to the plaintiff (see paras 26 & 30).

(2) Upon the true construction of the collateral agreement, the parties must conduct a joint audit to assess the deductions from the damaged, lost, missing of lost furniture. Once the deduction had been agreed, only then the balance of the security deposit was to be refunded to the plaintiff. The joint audit was not merely one of the modes to ascertain the deduction. It was the only mode as agreed by the parties in order to ascertain from the amount to be deducted from the security deposit (see paras 35–36).

(3) In cl 4.4 of the tenancy agreement, the return of the security deposit was subject to a proviso that the defendant 'shall be entitled to deduct from the deposit any monies as shall remain due and owing'. Therefore, the defendant's legal right to deduct from the security deposit could not be limited by any collateral agreement to negate that effect (see para 41).

(4) The joint audit was a pre-condition for the refund of the security deposit. Without a joint audit, the parties could not ascertain the amount to be deducted from the security deposit as provided by the proviso to cl 4.4 of the tenancy agreement. Since no joint audit was conducted to ascertain the deduction, the plaintiff's claim for the refund of the securities deposit was premature (see para 42).

[Bahasa Malaysia summary

Defendan, sebagai penyewa utama, telah menyewa premis-premis ('premis yang disewakan tersebut') daripada pemilik masing-masing dan telah memasuki perjanjian sewa dengan plaintif, penyewa kecil pelajar-pelajar plaintif untuk tempoh selama lima tahun. Berikutan klausa 4.1 perjanjian sewa, plaintif telah membayar RM879,960 kepada defendan sebagai bayaran deposit jaminan. Perjanjian sewa termasuk peruntukan katil, tilam, almari, kerusi dan meja ('perabut') untuk pelajar sejumlah 3,000. Plaintif kemudiannya memberi notis di bawah klausa 12 perjanjian sewa memberitahu bahawa ia tidak akan memperbaharui sewaan tersebut selepas perjanjian tamat pada 31 Mei 2012 dan premis yang disewakan tersebut kemudiannya diserahkan kepada defendan pada tarikh tersebut. Pihak-pihak kemudiannya mengadakan mesyuarat untuk menyelesaikan isu-isu yang belum diselesaikan yang berbangkit daripada perjanjian sewa dan perjanjian selanjutnya dibuat. Plaintif membayar kepada defendan RM2,988,988 berkaitan 'making good' premis tersebut di bawah klausa 6.15.2. Isu yang belum diselesaikan kekal berkaitan kepada deposit jaminan dalam jumlah RM879,960 yang akan dikembalikan kepada plaintif. Meskipun terdapat surat-surat daripada plaintif untuk mengembalikan deposit jaminan, defendan gagal untuk

mengembalikannya. Maka, plaintif memulakan guaman ini untuk mendapatkan semula deposit jaminan tersebut. Isu-isu yang berbangkit untuk penentuan adalah sama ada audit bersama adalah prasyarat untuk pengembalian deposit jaminan di bawah perjanjian sewa; sama ada deposit jaminan sebanyak RM879,960 mesti dikembalikan kepada plaintif tanpa audit bersama; sama ada defendan mempunyai hak undang-undang untuk mengekalkan deposit jaminan selepas tamat perjanjian sewa; dan sama ada tuntutan plaintif adalah prematang.

Diputuskan, menolak tuntutan dengan kos sebanyak RM20,000:

(1) Tidak terdapat apa-apa di dalam perjanjian sewa yang mana memperuntukkan mekanik atau prosedur untuk bayaran balik deposit jaminan. Pihak-pihak kemudiannya mengadakan mesyuarat. Tujuan mesyuarat adalah untuk menyelesaikan dua isu, iaitu 'make good' apa-apa ganti rugi kepada premis tersebut dan bayaran balik deposit jaminan. Pihak-pihak telah bersetuju untuk melakukan audit bersama untuk memastikan potongan yang perlu sebelum bayaran balik deposit jaminan boleh dibuat kepada plaintif (lihat perenggan 26 & 30).

(2) Atas pentafsiran betul perjanjian kolateral, pihak-pihak mesti menjalankan audit bersama untuk menilai potongan daripada kerosakan dan kehilangan perabut. Sebaik saja potongan dipersetujui, barulah baki deposit jaminan dibayar balik kepada plaintif. Audit bersama bukan hanya satu cara untuk memastikan potongan. Ia adalah satu-satunya cara seperti yang dipersetujui oleh pihak-pihak untuk memastikan daripada jumlah untuk dipotong daripada deposit jaminan (lihat perenggan 35–36).

(3) Dalam klausa 4.4 perjanjian sewa, pengembalian deposit jaminan adalah tertakluk kepada peruntukan bahawa defendan 'shall be entitled to deduct from the deposit any monies as shall remain due and owing'. Oleh itu, hak undang-undang defendan untuk memotong daripada deposit jaminan tidak boleh dihadkan oleh mana-mana perjanjian kolateral untuk menyangkal kesannya (lihat perenggan 41).

(4) Audit bersama adalah prasyarat untuk bayaran balik deposit jaminan. Tanpa audit bersama, pihak-pihak tidak dapat memastikan jumlah untuk dipotong daripada deposit jaminan seperti yang diperuntukkan oleh peruntukan klausa 4.4 perjanjian sewa. Memandangkan tiada audit bersama dijalankan untuk memastikan potongan, tuntutan plaintif untuk bayaran balik deposit jaminan adalah prematang (lihat perenggan 42).]

Cases referred to

Attorney General of Belize & Ors v Belize Telecom Ltd [2009] UKPC 10, PC (refd)

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29, FC (refd)

Legislation referred to

Companies Act 1965
Evidence Act 1950 ss 92, 101(2)

Muhammad Harez Fitri bin Roslee (Khalek Awang & Associates) for the plaintiff.

Meor Amir bin Meor Omar Baki (Azlina Abdul Aziz & Associates) for the defendant.

Azizah Nawawi JC:

INTRODUCTION

[1] The plaintiff's claim against the defendant is for the refund of the security deposit in the sum of RM879,960 pursuant to a tenancy agreement entered by the parties on 3 May 2007.

THE SALIENT FACTS

[2] The plaintiff is an institution of higher learning established under the Companies Act 1965 and has entered into a tenancy agreement with the defendant to house its students in Nilai, Negeri Sembilan. The defendant is the principal tenant and the plaintiff is the sub-tenant.

[3] The parties had executed a tenancy agreement on 3 May 2007 for the rental of an assemblage of premises known as PT12996, PT12996A, PT12996B, PT12996C GRN No 121860, HSD 103381 Lot 21566, Jalan BBN 1/7D, Putra Nilai, 71800 Nilai Negeri Sembilan ('the demised premise') for a period of five years. The defendant, being the principal tenant, has rented the demised premises from the respective owners.

[4] The relevant terms of the tenancy agreement are as follows:

(i) clause 4.1:

> The Sub Tenant shall, on execution of this tenancy deposit with the Principal Tenant the security deposit as set out in Part IV of the First Schedule hereto (hereinafter referred to as 'the Deposit') which sum shall be retained by the Principal Tenant as a deposit for the due performance and observance by the Sub Tenant of all its covenants undertakings and obligations herein contained.

(ii) clause 4.4

> The Principal Tenant shall, at the expiry of the Term hereby created or such renewal thereof (if any) refund the Deposit free of interest to the Sub Tenant PROVIDED THAT, prior to such refund, the Principal Tenant shall be entitled to deduct from the Deposit any monies as shall remain due and owing by the Sub Tenant at the time of the expiry of the tenancy or any renewal thereof.

(iii) clause 6 specifies the sub tenant covenants, which includes 6.15.1

> 'Surrender of the Demised Premise
>
> 6.15.1 On the expiration of the Term hereby created or any renewal thereof, to peacefully and quietly yield up the Demised Premises to the Principal Tenant together with all fixtures, fittings therein attached to and belonging to the Principal tenant in a good and tenantable repair condition in accordance with the covenants of the Sub Tenant hereinbefore contained and with all locks and keys complete.'

[5] Pursuant to cl 4.1 of the tenancy agreement, the plaintiff had disbursed RM879,960 to the defendant being the payment of security deposit on 4 May 2007.

[6] It is not in dispute that that the tenancy agreement for the demised premises includes the provisions of beds, mattresses, cupboards, chairs and tables ('the furniture') for the purposes of about 3,000 students.

[7] Vide a letter dated 23 November 2011, the plaintiff gave notice under cl 12 of the tenancy agreement that the plaintiff will not renew the tenancy after it expires on 31 May 2012. The demised premises were surrendered to the defendant on 31 May 2012.

[8] On 22 May 2012, the parties had a meeting to resolve outstanding issues arising from the tenancy agreement. The parties have agreed to certain terms as can be seen from the letter dated 23 May 2012 issued by legal adviser cum director of the legal unit of the plaintiff. The said letter reads as follows:

> 2. As per our meeting dated 22nd May 2012 with your goodself, it is agreed that Elemen Garisan Sdn Bhd is allowed to hold the security deposit amounting to RM879,960 for a period of three (3) months after the expiry of the Tenancy Period ie 31st May, 2012. The security deposit shall be refunded to the University immediately after 31st August 2012 after any necessary deduction, if any, for the replacement of lost, damaged or missing loose of the furniture in the Demised Premises as per clause 4.4 and clause 6.2 of the Tenancy agreement and agreed by parties.
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> 3 The meeting also agreed on the followings:-
>
> (i) The handing over of the Demised Premise will be held on 31st May 2012;

(ii) The joint audit of the Demised Premises by both parties will commence on 28th May 2012; and

(iii) Elemen Garisan Sdn Bhd shall be wholly responsible for the security of the Demised Premises after 31st May 2012.

4 In light of the above, the University will issue cheque payable to Elemen Garisan Sdn Bhd for the sum of RM2,988,988.00 being full and final settlement and upon receipt of the same, Elemen Garisan Sdn Bhd undertakes and agrees that Elemen Garisan Sdn Bhd shall have no more claim whatsoever against the University in respect of making good any damage to the Demised Premise as provided under clause 6.15 of the Tenancy Agreement. Elemen Garisan Sdn Bhd shall indemnify and hold the University harmless from and against any claims, demands, loss, damages, costs and expenses for which HUM shall and may become liable in respect of and to the extent that may arise from the related works of restoration of the Demised Premises.

[9] Pursuant to the agreement on 22 May 2012, the plaintiff has paid the defendant RM2,988,988 in respect of the 'making good' of the demised premises under cl 6.15.2.

[10] The outstanding issue remains with regards to the security deposit in the sum of RM879,960 which is to be returned to the plaintiff after 'any necessary deduction for the replacement of lost, damaged and missing loose of the furniture' in the demised premises.

[11] Despite three letters from the plaintiff and its solicitor for the refund of the security deposits, the defendant failed to return the same. Hence the filing of this suit is to recover the security deposit.

[12] In the course of case management, I have advised the parties to come to an amicable settlement, but that has failed.

ISSUES TO BE TRIED

[13] The issues to be tried are as follows:

(a) whether the joint audit is a precondition for the refund of the security deposit under the tenancy agreement;

(b) whether the security deposit of RM879,960 must be refunded to the plaintiff without the joint audit;

(c) whether the defendant has a legal right to retain the security deposit after the expiry of the tenancy agreement; and

(d) whether the plaintiff's claim is prematured.

THE PLAINTIFF'S SUBMISSION

[14] It is the submission of learned counsel for the plaintiff that a joint audit is not a prerequisite requirement to be complied with prior to the refund of the security deposit because the parties are subject to the terms of the tenancy agreement. Clause 4.1 of the tenancy agreement provides that the security deposit be retained by the defendant as a deposit for the performance and observance by the plaintiff of all its covenants, undertakings and obligations.

[15] The plaintiff further submits that there is a proviso in the tenancy agreement which allows the defendant to deduct the security deposit provided that the defendant is able to prove the plaintiff's indebtedness. However the defendant has waived his right under the cl 4.4 of the tenancy agreement for failing to conduct the joint audit.

[16] Although there is no joint audit conducted, the plaintiff submits that refund is still payable to the plaintiff after the expiration of the 3-month extension. The tenancy agreement does not provide for such prerequisite to be complied whereas the tenancy agreement only discloses that the defendant is to deduct the security deposit if there is any indebtedness by the plaintiff.

[17] The defendant, at all material times, knew that the plaintiff would rely upon the defendant to make the necessary deduction of the security deposit if there is any damage caused by the plaintiff during the tenancy period. Therefore, pursuant to s 101(2) of the Evidence Act 1950, the plaintiff's counsel contended that the burden of proof that there were necessary steps taken by the defendant to prove the plaintiff's indebtedness lies on the defendant.

[18] In any event, after the expiration of the extended period of three months as agreed by parties pursuant to meeting dated 22 May 2012 the defendant still failed to make the necessary deduction, ie replacement of lost, damaged or missing loose of the furniture in the demised premises, and the defendant has failed to submit an audit report to the plaintiff.

THE DEFENDANT'S SUBMISSION

[19] It is the submission of learned counsel for the defendant that cl 4.4 provides terms for the refund payable to the plaintiff. However, since no precise figure is provided for this purpose, the parties through the meeting on 22 May 2012 had agreed to conduct a joint audit in order to obtain the correct sum for

the purposes of the refunded. Accordingly, counsel for the defendant submitted that this would amount to a collateral contract provided under s 92 of the Evidence Act.

[20] Pursuant to the said collateral contract, a joint audit was agreed by the parties to be conducted in the presence of both parties to verify the figures for the purposes of the refund.

[21] The defendant submits that the failure of the plaintiff in conducting the joint audit is a major factor why the security deposit is still held by the defendant. The defendant contends that a joint audit is an essential prerequisite. It is necessary to determine the damage and loss of goods at the demised premises before the security deposit can be refunded to the plaintiff.

[22] The defendant further submits that he has a legal right under the agreement to recover compensation for damage and loss of equipment, and is entitled to hold a security deposit to ensure that the plaintiff discharge its responsibilities.

[23] Further, the defendant submits that failure of the plaintiff to call representative from Centre of Foundation Studies in Nilai as their witness is fatal. This is because their evidence would have established the reasons why the plaintiff has failed to conduct and/or be involved in the joint audit.

THE FINDINGS OF THE COURT

[24] It is common ground that under cl 4 of the tenancy agreement, the plaintiff shall deposit the security deposit in the sum RM879,960 with the defendant for the due performance and observation by the plaintiff of its undertakings and obligations.

[25] Under cl 4.4 of the agreement, the defendant is to refund the deposit to the plaintiff. It is also provided that prior to the refund, the defendant shall be entitled to deduct from the deposit any monies as shall remain due and owing by the plaintiff to the defendant at the time of the expiry of the tenancy agreement.

[26] However, there is nothing in the tenancy agreement which provides the mechanics or procedures for the return of the security deposit. As such, the parties had a meeting on 22 May 2012, and the parties agree on the terms of the refund of the security deposit in such manner:

(a) that the defendant is allowed to hold the security deposit for three months after 31 May 2012–31 August 2012;

(b) that the security deposit shall be refunded after any necessary deduction for the replacement of lost, damaged or missing loose of the furniture in the premise as per cll 4.4 and 6.2 of the agreement and agreed by both parties; and

(c) that joint audit of the premise by both parties will commence on 28 May 2012.

[27] The above terms agreed between the parties in the meeting on 22 May 2012 are contained in a letter dated 23 May 2012 issued by the plaintiff's legal unit.

[28] It is common ground that the terms contained in the letter dated 23 May 2012 is a collateral agreement on the manner of the refund of the deposit. In fact, learned counsel for the plaintiff has conceded to this collateral agreement during his oral submission in court.

[29] As this case involves the interpretation of the collateral agreement as contained in the letter dated 23 May 2012 and the tenancy agreement, the guiding principle can be found in the decision of the Federal Court in *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd* [2010] 1 MLJ 597, where the court held that the most recent statement of the guideline to interpretation of contract is to be found in *Attorney General of Belize & Ors v Belize Telecom Ltd* [2009] UKPC 10 and quoted Lord Hoffman at p 621:

> The court has no power to improve upon the instrument which is called upon to construe, whether it be a contract, a statute or articles of association. *It cannot introduce terms to make it fairer or more reasonable*. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called *the intention of the parties*, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[30] Reading the said letter in its entirety, I am of the considered opinion that the purpose of the meeting was to settle two issues, namely the 'make good' of any damages to the demised premises and the refund of the security deposit. The 'make good' involves the rectification of any damages to the demised premises which the parties settled at the cost of RM2,988,988. There is no dispute on the 'make good' issue. With regards to the refund of the security

deposit, the parties have agreed to conduct a joint audit to ascertain the necessary deduction before the refund of the security deposit can be made to the plaintiff.

[31] Bearing in mind the intention of the parties to enter into the collateral agreement which is also to resolve the issue of the refund of the security deposit, I am of the considered opinion that the usage of the words 'joint audit' and 'by both parties' in the letter dated 23 May 2012 must be given its ordinary dictionary meaning. According to the *Oxford Advanced Learner's Dictionary of Current English* (1974), the meanings to the relevant words are as follows:

(a) the word 'joint' means 'done by two or more persons together';

(b) the word 'by' means 'through the agency, means or instrumentality, of'; and

(c) the word 'both' simply means 'the two, not only the one'.

[32] Therefore, where the parties have agreed that '(c) The joint audit of the demised premise by both parties will commence on 28 May 2012', this can only mean that the joint audit must be done physically together, by the plaintiff and the defendant. It cannot mean that the defendant will audit first and give the report to the plaintiff as contended by the plaintiff. Bearing in mind that the audit involves assessing the damaged, missing, lost or loose furniture, this can only be done through a joint assessment as there are different range in damages to the furniture. In Q21, the defendant gave evidence (which has not been disputed by the plaintiff) on the assessment of the damage to the furniture in the demised premises. His evidence is as follows:

> Penilaian kerosakan diukur berdasarkan tahap kerosakan dan proses membaik pulih.
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> *Minor damage* — kerosakan pada bahagian yang boleh diganti secara lansung tanpa mencatatkan peralatan secara keseluruhan (ada spare part). Contohnya - kehilangan stopper pada katil/locker handle, wiremesh katil tidak bengkok dan hanya tertanggal di beberapa bahagian.
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> *Major damage* — kerosakan yang berlaku pada badan peralatan mencacatkan rupa. Contohnya — katil bengkok/patah di bahagian tengah, pintu locker tercabut/meja patah/tilam koyak dan sebagainya.
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> *Missing* — terdapat bahagian peralatan yang hilang. Contohnya katil seperti tangga, badan atas atau bawah.
>
> *Total Lost* — kerosakan yang melampau/banyak kerosakan pada sesuatu peralatan. Contohnya kesan kebakaran pada lokar, badan lokar senget keseluruhanya.

Therefore, it makes more sense for parties to assess together as to whether a locker is damaged or not, the degree of damage and agree to the same. This is because any deduction on the damaged furniture must be agreed by both parties.

[33] It makes no sense at all if the defendant is to assess whether a locker is damaged, give the report to the plaintiff, who will then assess it at their own time. What happen if the plaintiff is of the opinion that the locker is not damaged, or that it sustains only minor damage and not major damage, does it mean that both parties will do another assessment over a locker?

[34] Bearing in mind that the parties have also agreed that the joint audit is to commence on 28 May 2012, which is about two days before the expiry of the agreement, it makes more sense for it to be a joint audit. If the parties have intended that the defendant is to do the audit first and to be verified by the plaintiff later, why is there a necessity to specify the date to commence the joint audit, on 28 May 2012.

[35] In the premise, I am of the considered opinion that upon the true construction of the collateral agreement in the letter dated 23 May 2012, the parties must conduct a joint audit to assess the deductions from the damaged, lost, missing of lost furniture. Once the deduction is agreed by parties, only then the balance of the security deposit is to be refunded to the plaintiff.

[36] I do not agree with the contention of the plaintiff that the joint audit is merely one of the modes to ascertain the deduction. To me, it is the only mode as agreed by the parties in order to ascertain the amount to be deducted from the security deposit. In fact if we look at the statement of claim of the plaintiff, there is nothing on the joint audit, or that the joint audit means the defendant audit first and the plaintiff will verify. From paras 7 and 8 of the statement of claim, the reference to the collateral agreement is only to support the plaintiff's contention that the defendant must refund the sum after the expiry of the three months period. In any event, since the letter dated 23 May 2012 was issued by the plaintiff's legal department, applying the contra proferentem rule, any ambiguity to the meaning in the said letter must be construed against the plaintiff, (see *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29).

[37] On the facts of the case, it is not in dispute that no joint audit was concluded by both parties. Under cross-examination, PW1 agreed that no joint audit was conducted. PW2 gave evidence that there was an attempt to do a joint audit but the defendant failed to cooperate. However, PW2 agreed that he was only informed of the matter as the matter was handled by the Nilai Centre. On the other hand, the defendant gave evidence that the joint audit was not conducted. Bearing in mind that both plaintiff witnesses are not from the Nilai Centre, and that they both agree that all the day to day management of the Nilai Centre are done by its officers in the centre, both PW1 and PW2 have no knowledge of the ground work done at the centre. Without any witnesses from the centre itself to verify whether it was the defendant who failed to corporate

with the plaintiff on the attempt at joint audit, I accept the evidence of the defendant that it was the plaintiff who did not cooperate with the defendant to complete the joint audit. In Q27, the defendant says that the joint audit failed as there was no response from the plaintiff.

[38] The last issue is whether the joint audit is a pre condition for the return of the security deposit. The defendant submits that the joint audit is a pre condition for the security deposit and since the parties has yet to conduct the joint audit, this suit, which is instituted for the recovery of the security deposit is pre mature. However, the plaintiff submits that the crucial part of the collateral agreement is the time frame specified, namely the defendant is allowed to hold the security deposit for three months but shall refund the same immediately after 31 August 2012.

[39] In the said letter dated 23 May 2012, it is clearly stated that the security deposit shall be 'refunded to the University immediately after 31st August 2012 after any necessary deduction, if any, for the replacement of lost, damaged or missing loose of the furniture in the Demised Premises'. The necessary deduction for the replacement and/or damages to the furniture can only be ascertained after a joint audit. That is why a time frame was given for the parties to start the joint audit, which is to commence on 28 May 2012 and to be completed within three months; thereafter the balance is to be refunded to the plaintiff. In fact, under cross-examination PW2 agreed that the three months is for the joint audit.

[40] The plaintiff did not show any evidence on their concerns over the auditing. They did not even plead the issue of auditing in their statement of claim. No one from the Nilai Centre came to give evidence as to whether there was any attempt made to initiate the joint audit. The two plaintiff witnesses have no knowledge on what happen in the Nilai Centre and gave evidence on their understanding of the tenancy agreement. Under cross-examination PW1 agreed that two officers from the Nilai Centre, Anas Shamsudin and Salmee would know about the joint audit, but these two officers were not called to give evidence. PW1 also agreed with learned counsel for the defendant that the officers of the Nilai Centre would know that a joint audit is required. PW1 also agreed that the defendant can deduct from the security deposit for any furniture that is lost or damaged in the demised premises.

[41] In cl 4.4 of the tenancy agreement, the return of the security deposit is subject to a proviso, that the defendant 'shall be entitled to deduct from the Deposit any monies as shall remain due and owing'. Therefore the defendant's legal right to deduct from the security deposit cannot be limited by any collateral agreement to negate that effect. As such, I am of the considered opinion that the three months period is for the purposes of the joint audit, and

not a time frame for the defendant to make the deduction as suggested by the plaintiff, failing which the defendant must return the security deposit.

[42] In the premise, I am of the considered opinion that the joint audit is a pre condition for the refund of the security deposit. Without a joint audit, the parties cannot ascertain the amount to be deducted from the security deposit as provided by the proviso to cl 4.4 of the tenancy agreement. Since no joint audit was conducted to ascertain the deduction, I am of the considered opinion that the plaintiff's claim for the refund of the securities deposit is pre matured. The plaintiff's claim is dismissed with agreed cost of RM20,000.

Claim dismissed as the costs of RM20,000.

Reported by Afiq Mohamad Noor